

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES JAY FRANKINA,

Defendant-Appellant.

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UNPUBLISHED

May 22, 2003

No. 231974

Macomb Circuit Court

LC No. 00-000503-FH

Before: Murray, P.J., and Neff and Talbot, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of first-degree criminal sexual conduct (CSC I) accomplished by force or coercion that caused the victim personal injury. MCL 750.520b(1)(f). The circuit court sentenced defendant, as a second habitual offender, MCL 769.10, to a term of fourteen to twenty-one years' imprisonment. Defendant appeals as of right. We affirm defendant's conviction, but remand for resentencing.

I.

Defendant first argues that the circuit court committed error requiring reversal when it conducted a perfunctory and inadequate voir dire of prospective jurors, and refused to permit defense counsel to question the prospective jurors. However, our review of the record reflects that defendant waived these allegations of error, thus extinguishing them, when his counsel made a statement affirmatively expressing his satisfaction with the jury selected ("We have a jury, Your Honor."). *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000); *People v Hubbard (After Remand)*, 217 Mich App 459, 466; 552 NW2d 493 (1996). While defense counsel did not utilize the words, "The defense is satisfied with the jury, Your Honor," defense counsel's positive and unqualified assertion, in the context of the record demonstrating that the parties had just abandoned further available challenges to the prospective jurors, plainly constitutes an affirmative expression of contentment with the selected jury.<sup>1</sup>

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<sup>1</sup> Defendant also forfeited any allegation of error relating to jury voir dire because he did not object to the circuit court's advice that it would conduct questioning of the prospective jurors, and used only two of his available peremptory challenges. *Hubbard (After Remand)*, *supra*; see also *People v Russell*, 434 Mich 922; 456 NW2d 83 (1990), rev'g 182 Mich App 314 (1990), for (continued...)

## II.

### A.

Defendant next argues that the circuit court expressed judicial bias or impartiality that deprived him of a fair trial and the presumption of innocence. Because defendant voiced no objection or other concern at trial regarding any allegedly improper comments made by the circuit court, defendant has not preserved this issue for appellate review. *People v Sardy*, 216 Mich App 111, 117-118; 549 NW2d 23 (1996). Accordingly, we review defendant's claim only to determine whether plain error affected his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant decries the circuit court's statements that the testimony by Deputy Sheriff Colleen Burke regarding defendant's use of a false name and apartment number shortly after the victim's assault "shows concealment of identification. It shows that he's trying to hide something. You can bring a witness in if you wish to overrule [sic] it in some manner." Considered in context, it is not plainly apparent that the circuit court's remarks were of such a nature as to unduly influence the jury and thereby deprive defendant of his right to a fair and impartial trial. *City of Lansing v Hartsuff*, 213 Mich App 338, 349-350; 539 NW2d 781 (1995). The court did not intend to express its belief that defendant generally lacked credibility. The challenged statements merely reflect the circuit court's explanation of its relevance ruling, specifically its concurrence in the reasoning proffered by the prosecutor for admitting Burke's testimony concerning defendant's lies. See *id.* at 350. Furthermore, the court's final statement did not place on defendant the burden of proving or rebutting anything, but merely noted the court's receptiveness to defendant's presentation of testimony explaining a nonconcealment reason why he lied in the course of making a domestic violence complaint against his wife later on the day of the victim's assault. Defendant offers absolutely no further specific examples of judicial impropriety in support of his arguments, *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001), and our review of the trial transcripts discloses no improper conduct by the court.

### B.

In a related, one-sentence argument, defendant asserts that the circuit court abused its discretion in admitting the testimony of Burke and another deputy concerning the significance of defendant's use of a false name and apartment number. We review the court's admission of Burke's testimony, to which defendant objected at trial, for a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

Defendant's argument does not clearly explain on what evidentiary basis he challenges the court's admission of Burke's testimony, but at trial he pursued an objection on the basis of

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the reasons stated in Judge Sawyer's dissenting opinion. Moreover, contrary to defendant's argument on appeal, the circuit court did specifically advise the jurors regarding the nature of the case and inquired whether they might have some bias or concern regarding criminal sexual conduct.

relevance. MRE 401 and 402. We find that, in this case, in which defendant denied sexually assaulting the victim, evidence that later on the day of the crime he concealed his identity during an encounter with the police circumstantially tended to demonstrate his consciousness of guilt of the charged crime, the central issue of the case. MRE 401; *People v Haxer*, 144 Mich 575, 577; 108 NW 90 (1906).<sup>2</sup> Furthermore, the probative value of the false statements showing defendant's consciousness of guilt was not substantially outweighed by the danger of unfair prejudice or confusion of the issues, especially in light of the direct evidence of defendant's guilt, i.e., the victim's testimony identifying defendant as her assailant, and the circuit court's proper cautionary instruction to the jury regarding the equivocal nature of the evidence. MRE 403; *People v Herndon*, 246 Mich App 371, 421-422; 633 NW2d 376 (2001); *People v Wolford*, 189 Mich App 478, 481-482; 473 NW2d 767 (1991).

With respect to defendant's argument regarding the court's admission of testimony by another deputy, we decline to consider this claim because defendant offered no objection to the testimony at trial, he fails in his brief on appeal to explain the evidentiary basis for his challenge to the testimony, and none of the cases cited by defendant in support of his one-sentence argument on appeal appear relevant to his argument. MCR 2.613(A); *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000); *People v Dowdy*, 211 Mich App 562, 570; 536 NW2d 794 (1995).

### III.

Defendant further asserts that there was insufficient evidence that he inflicted personal injury to support his conviction of CSC I. In reviewing a challenge to the sufficiency of the evidence, this Court considers the evidence presented in the light most favorable to the prosecution to determine whether a rational juror could have found that the elements of the crime charged were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). "The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *Id.* at 400.

The prosecutor charged defendant with CSC I as described within MCL 750.520b(1)(f), which provides, in relevant part, as follows:

A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:

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<sup>2</sup> Defendant cites *People v Thompson*, 101 Mich App 609; 300 NW2d 645 (1980), a case distinguishable from the instant case. In *Thompson*, this Court determined that the introduction of the bare fact that a defendant had used an alias "would [improperly] permit an inference of *nonspecific* misconduct." *Id.* at 613 (emphasis in original). The Court clarified that the use of an alias in connection with or in furtherance of some "specific ignoble purpose" might "be admissible under MRE 608 and MRE 609 to affect credibility," or "under MRE 404(b) as part of the prosecutor's case in chief in a false pretenses case, for example." *Thompson, supra* at 613-614. In this case, the prosecutor did not know only that on some unspecified past occasion the witness had used an alias, but that defendant utilized the alias for the ignoble purpose to conceal his identity as the victim's assailant.

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(f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. Force or coercion includes but is not limited to any of the following circumstances:

(i) When the actor overcomes the victim through the actual application of physical force or physical violence.

The Legislature has defined “personal injury” to include “*bodily injury*, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ.” MCL 750.520a(k) (emphasis added). This Court has long recognized “the legislative judgment that evidence of even insubstantial physical injuries is sufficient to support a conviction for criminal sexual conduct in the first-degree.” *People v Himmelein*, 177 Mich App 365, 378; 442 NW2d 667 (1989).

Viewed in the light most favorable to the prosecution, the testimony in this case, by the victim and a nurse who thoroughly examined the victim two days after defendant assaulted her, constituted an ample basis for a rational jury to find beyond a reasonable doubt that defendant’s painful insertion of his hand into the victim’s vagina caused an injury apparent two days after the attack, and that defendant pulled out some of the victim’s hair during the crime causing soreness that continued two days later. *Nowack, supra*. While no indication exists that the injuries inflicted by defendant permanently or seriously disfigured the victim, the evidence regarding even these allegedly insubstantial injuries satisfied the bodily injury portion of the personal injury element of MCL 750.520b(1)(f). *People v Mackle*, 241 Mich App 583, 596, 598; 617 NW2d 339 (2000); *Himmelein, supra* at 377.<sup>3</sup>

#### IV.

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<sup>3</sup> Defendant provides no authority supporting his suggestion that a victim’s insubstantial bodily injuries must have some confirmation by “physician testimony or medical evidence,” or “at least photographic documentation.” As reflected by this Court’s decision in *Mackle, supra* at 598, in which this Court found bodily injury arising from open-hand slaps apparently substantiated only by the victim’s testimony, no such requirement exists.

Additionally, to the extent that defendant alludes to a constitutional claim by stating, “To find the facts of this case sufficient to support a finding of personal injury would require the entire statutory construction to fail as it would be clearly void on grounds of vagueness,” we need not address it because defendant made no constitutional objection before the circuit court and, on appeal, offers absolutely no authority or development of an argument in support of a constitutional vagueness violation. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998); *People v Pitts*, 222 Mich App 260, 272; 564 NW2d 93 (1997). Moreover, defendant’s void for vagueness suggestion lacks merit in light of (1) this Court’s definitions of “bodily injury” as including even insignificant physical injuries, *Mackle, supra* at 596-598; *Himmelein, supra* at 377-378, and (2) defendant’s lack of standing to raise a vagueness challenge to the meanings of “bodily injury” or “personal injury” because his injuries of the victim’s vagina and head plainly fall within the scope of MCL 750.520a(k) and 750.520b(1)(f). *People v White*, 212 Mich App 298, 312; 536 NW2d 876 (1995); *People v Mitchell*, 131 Mich App 69, 74; 345 NW2d 611 (1983).

Defendant additionally avers that the circuit court erred in admitting under MRE 804 the prior, preliminary examination testimony of Brandy Doty, a victim of a similar assault by defendant that occurred approximately two weeks before defendant's assault of the instant victim.<sup>4</sup> This Court reviews for clear error the circuit court's findings of fact, including whether a witness qualifies as unavailable. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995), citing MCR 2.613; *People v Murry*, 106 Mich App 257, 260; 307 NW2d 464 (1981). This Court reviews for a clear abuse of discretion the circuit court's admission of evidence. *Starr, supra*.

Defendant does not appear to specifically challenge the circuit court's finding that Doty qualified as an unavailable witness under MRE 804(a)(4). In light of the undisputed facts that, at the time of defendant's trial in October 2000, Doty had up to approximately three months remaining in the course of her high-risk pregnancy that prevented her from leaving her bed in Ohio and traveling, we cannot conclude that the circuit court clearly erred in finding that Doty was "unable to be present or to testify at the hearing because of . . . then existing physical . . . illness or infirmity," MRE 804(a)(4). *People v Gross*, 123 Mich App 467, 469-470; 332 NW2d 576 (1983); *People v Lytal*, 119 Mich App 562, 567-568; 326 NW2d 559 (1982). Contrary to defendant's argument before the circuit court, the prosecutor need not demonstrate due diligence when unavailability is established under MRE 804(a)(4). *Gross, supra* at 470.<sup>5</sup>

Because Doty was unavailable according to MRE 804(a)(4), we conclude that the circuit court did not abuse its discretion in admitting her prior preliminary examination testimony. The circuit court correctly observed that Doty's prior testimony, which she offered in support of a charge that defendant assaulted her with the intent to commit criminal sexual conduct involving penetration, need not have occurred during the preliminary examination held to address the instant charges. "MRE 804(b)(1) by its language permits testimony from 'the same or a different (prior) proceeding' if the party against whom the testimony is offered had the opportunity and motive in the prior proceeding 'to develop the testimony by direct, cross, or redirect examination.'" *People v Morris*, 139 Mich App 550, 555; 362 NW2d 830 (1984). As in *Morris, supra*, the instant defendant had an opportunity to cross-examine Doty during her prior testimony because the testimony arose in a prior preliminary examination in which he also was the defendant. Furthermore, given the striking similarities between Doty's and the instant victim's charged assaults by defendant, including that defendant solicited the services of both women from escort services, gave the women false names and apartment numbers, requested that the women dress similarly and wear no underwear, met the women in the apartment building lobby, then allegedly assaulted both women in the privacy of a closed elevator, defendant had the

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<sup>4</sup> The court admitted Doty's testimony pursuant to MRE 404(b), a ruling defendant does not specifically challenge on appeal.

<sup>5</sup> To the extent defendant suggests that the circuit court should have granted a continuance to await Doty's availability to appear at trial, defendant requested no adjournment or continuance from the circuit court and offers no authority within his brief on appeal tending to support his entitlement to one. *Kelly, supra*; *People v McCrady*, 213 Mich App 474, 481; 540 NW2d 718 (1995).

motivation to similarly attempt to discredit both Doty and the victim, despite that the ultimate charges against defendant in each case differed.<sup>6</sup>

With respect to defendant's suggestion that the admissibility of Doty's prior testimony pursuant to MRE 804(b)(1) deprived him of his constitutional right of confrontation, defendant apparently recognizes that our Supreme Court has decided to the contrary in *People v Meredith*, 459 Mich 62, 67-71; 586 NW2d 538 (1998). The Supreme Court held that MRE 804(b)(1) constitutes a firmly rooted hearsay exception, and that "the fact that MRE 804(b)(1) is a firmly rooted exception means that, for present purposes, the prior testimony of the [witness] bears satisfactory indicia of reliability. The Confrontation Clause is satisfied, and the testimony is admissible." *Meredith*, *supra* at 69-71. Accordingly, defendant's suggestion of a constitutional violation arising from the admission of Doty's prior testimony lacks merit.

Defendant further suggests that the circuit court erred in permitting the jury to review transcribed copies of Doty's testimony during the reading of the transcribed testimony. While defense counsel objected at trial to the timing of the jury's review of the transcript, the record indicates that counsel subsequently and affirmatively waived his objection. *Carter*, *supra*. Furthermore, we decline to consider defendant's argument that the transcript review procedure constituted error requiring reversal because defendant provides no authority supporting his argument. *Davis*, *supra*.<sup>7</sup> Moreover, defendant did not provide this Court with a copy of the allegedly improper, unsanitized transcript, and offers absolutely no indication of anything inappropriate or prejudicial within the transcript that the jury reviewed. *Traylor*, *supra*. Defendant also failed to request at trial an instruction concerning the jury's limited review of the transcript, and offers no authority in his brief on appeal for the proposition that the circuit court should have read such an instruction. *People v Mills*, 450 Mich 61, 80-81; 537 NW2d 909, mod 450 Mich 1212 (1995), citing MCL 768.29; *Davis*, *supra*.<sup>8</sup>

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<sup>6</sup> Our review of defendant's thorough cross-examination of Doty during the prior preliminary examination and his cross-examination of the instant victim reveals that the examinations contained many similarities concerning both women's prior escort service employment, the nature and cost of the services the women provided, their imposition of a cancellation fee when an individual who solicited their services later refused them, whether defendant canceled his appointments with them, and the nature of the women's and defendant's conduct aboard the enclosed elevator. While defendant suggests that the district court curtailed his efforts to cross-examine Doty concerning whether other customers had refused her services and incurred cancellation fees, the transcript of Doty's testimony reflects that defendant twice successfully inquired of Doty whether other clients had canceled her services and occasioned a fee, and that the district court sustained the prosecutor's objection to defendant's third such inquiry. Defendant offers no specific examples of any further questions that Doty's failure to appear at trial deprived him of the opportunity to pose to her.

<sup>7</sup> Unlike the cases cited by defendant, the circuit court here did not send a copy of the preliminary examination transcript that the parties did not introduce into evidence to the jury room during deliberations. See *People v Page*, 41 Mich App 99, 102-104; 199 NW2d 669 (1972).

<sup>8</sup> While defendant characterizes the timeliness of the prosecutor's disclosure of Doty's condition as in "bad faith . . . after a full day of trial," it appears that the prosecutor timely notified  
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## V.

Defendant next argues at length that misconduct by the prosecutor permeated the proceedings and deprived him of a fair trial. Because defendant did not object at trial to any conduct of the prosecutor, we review these unpreserved claims of misconduct for plain error affecting defendant's substantial rights. *People v Schutte*, 240 Mich App 713, 720-721; 613 NW2d 370 (2000).

Despite defendant's inadequate presentation of the factual bases of nearly all of his prosecutorial misconduct claims, *Traylor, supra*, we have painstakingly reviewed each and every portion of transcript cited by defendant as illustrative of some form of misconduct. Most of the transcript excerpts reflect proper argument by the prosecutor on the basis of the evidence admitted at trial and the reasonable inferences arising therefrom. *Schutte, supra* at 721. The prosecutor properly argued at length on the basis of the record that defendant lacked credibility, responded to various arguments raised by defendant, and in apparent good faith admitted evidence during trial. *Id.*; *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999); *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

Even assuming that the prosecutor improperly advised the jury that defense counsel sought to mislead them and made statements comparing defendant with Al Capone, O.J. Simpson, and the Menendez brothers, no plain error affected defendant's substantial rights in light of (1) the responsive nature of the prosecutor's remarks, (2) the isolated nature of the statements, (3) defendant's failure to object to the remarks at trial, and (4) the circuit court's instructions to the jury that the arguments and statements of the attorneys did not constitute evidence. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).<sup>9</sup>

## VI.

Defendant further contends that the cumulative effect of the errors during trial deprived him of a fair trial. However, in light of the facts that (1) defendant failed to object to any improper comments by the prosecutor, which the circuit court cured with its instructions, (2) defendant's other allegations of error lack merit, and (3) ample evidence of defendant's guilt

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defendant and the court of Doty's high-risk pregnancy, and defendant cites no authority in support of his claim of bad faith. *Davis, supra*. Furthermore, while defendant argues that the prosecutor's earlier notification concerning Doty's unavailability would have permitted him to request an adjournment of trial, as mentioned previously, defendant made no indication at trial that he needed or desired such an adjournment. Moreover, it does not appear that earlier notice of Doty's condition would have altered the unfolding of defendant's trial, or that defendant suffered any prejudice from Doty's unavailability, given his significant cross-examination of her at his preliminary examination.

<sup>9</sup> Because defendant has failed to demonstrate any instance of prosecutorial misconduct that constituted plain error affecting his substantial rights, we reject his related claim that counsel's failure to object at trial to the prosecutor's conduct deprived him of the effective assistance of counsel, without the need for a remand to further examine the reasonableness of defense counsel's conduct. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

existed, including the victim's testimony and identification of defendant, we cannot conclude that any cumulative error seriously prejudiced defendant and deprived him of a fair trial. *People v Knapp*, 244 Mich App 361, 387-388; 624 NW2d 227 (2001); *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999).

## VII.

Defendant lastly suggests that we remand to the circuit court for resentencing. The parties agree that the prosecutor filed notice of his intent to enhance defendant's sentence on the basis of his habitual offender status on June 21, 2000, more than ninety days after defendant's waiver of his circuit court arraignment on March 8, 2000. The prosecutor's untimely filing of the notice beyond the twenty-one-day period prescribed by MCL 769.13(1) precluded him from requesting that the circuit court impose an habitualized sentence. *People v Hornsby*, 251 Mich App 462, 469-470; 650 NW2d 700 (2002). Because the circuit court inappropriately enhanced defendant's sentence on the basis of his second habitual offender status, and the parties and the circuit court agree that defendant is entitled to resentencing, we remand this case solely for defendant's resentencing.

We affirm defendant's conviction, but remand for resentencing. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Janet T. Neff

/s/ Michael J. Talbot